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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

19 Cr. 521 (PKC)

5 PETER BRIGHT,

6 Defendant.

7 -----x

8 February 7, 2020

9 2:30 p.m.

10 Before:

11 HON. P. KEVIN CASTEL,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

16 United States Attorney for the
17 Southern District of New York

BY: ALEXANDER LI

18 TIMOTHY T. HOWARD

Assistant United States Attorneys

19 FEDERAL DEFENDERS OF NEW YORK

Attorneys for Defendant

20 BY: ZAWADI BAHARANYI

AMY GALLICCHIO

21 ALSO PRESENT: ELIZABETH JENSEN, Special Agent, FBI

22 ALONDRA RAYES, Paralegal, Federal Defenders

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1 (Case called)

2 THE DEPUTY CLERK: For the government.

3 MR. LI: Good afternoon, your Honor. Alexander Li and
4 Timothy Howard for the government.

5 THE COURT: Good afternoon to you both.

6 MR. LI: Good afternoon. With us is FBI special agent
7 Elizabeth Jensen.

8 THE COURT: All right, Ms. Jensen. Good afternoon.

9 And for the defendant?

10 MS. GALLICCHIO: Good afternoon, your Honor. Federal
11 Defenders by Amy Gallicchio with Zawadi Baharanyi. Also
12 present with us is Alondrda Rayes, who is paralegal on this
13 matter, and of course Mr. Bright.

14 THE COURT: Good afternoon to you all.

15 So, I have a number of *in limine* motions. I may start
16 with some questions and I will give you an opportunity. If
17 there is anything else that anybody else wants to say, they
18 can.

19 Now, it comes up a couple of times in the excerpts.
20 There is a reference to the 17-year-old with the 14-year-old
21 sister, there is a 2011 conversation in which there is a
22 reference to a pop star. The question is why does any
23 conversation regarding a 17-year-old, who is above the age of
24 consent in New York, come in?

25 MR. LI: Your Honor, I think it is relevant for two

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1 reasons and both pertain to the defendant's intent.

2 First, your Honor, a 17-year-old, although it is
3 within the age of consent in New York, for federal child
4 pornography law purposes that is a person, a minor. That is a
5 minor for purposes of the child pornography laws. The
6 defendant's stated in parts of his post-arrest statement that
7 he received "a nudish photograph" from the 17-year-old girl. I
8 think this puts this case squarely in the framework of *United*
9 *States v. Brand* where the Second Circuit held that child
10 pornography is relevant to the question of intent in a child
11 entitlement case because it goes to whether the defendant has
12 an abnormal sexual attraction to children.

13 THE COURT: So what you would say is I should say to
14 the jury: *Ladies and gentlemen of the jury, as I will tell you*
15 *at the conclusion of this case, the age of legal consent in New*
16 *York is 17 and the defendant can only be convicted of this*
17 *crime if the person who he was seeking to entice is below the*
18 *age of 17. Yet, in the case of child pornography, with which*
19 *he is not charged, it could be a piece of child pornography*
20 *which happens to be against a federal statute if communicated*
21 *by a facility of interstate commerce or a wire if the person is*
22 *under the age of 18.*

23 Is that what you want me to tell the jury? Or just
24 don't bother telling them that second part? Or the first part?

25 MR. LI: Your Honor, I think this does go to the

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1 question of the defendant's intent. I think a limiting
2 instruction can cabin some of the concerns that the Court has.

3 THE COURT: What I am asking you is wouldn't I have to
4 tell the jury all of that?

5 MR. LI: I don't think the Court would need to tell
6 the jury all of that.

7 THE COURT: So, give me your limiting instruction.

8 (Counsel conferring)

9 MR. LI: Your Honor, I think the instruction would be
10 that the defendant is not charged with child pornography.
11 Whether in fact he received child pornography is not at issue.
12 The statement that the defendant might have -- the defendant's
13 own admission that he might have received a nudish photograph
14 or that he did receive a nudish photograph from this
15 17-year-old should only be used for the purpose of his intent
16 to commit the crime of child enticement, that is, whether he
17 intended --

18 THE COURT: But what you are leaving out of your
19 limiting instruction -- the question that I asked you was about
20 the limiting instruction so let's talk about this. What you
21 are leaving out of your limiting instruction is that it's
22 unlawful to possess a sexually explicit picture of someone
23 between the age of 17 and 18. I am trying to get this jury to
24 understand that they can only convict if the intended persons
25 who were enticed were below 17, even though the statute refers

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1 to the 18-year threshold. That's a concept that this jury
2 needs to understand. I can't just say something about, well,
3 child pornography, in general, without saying to them even
4 though you can't be convicted of the crime unless the intended
5 victims were below 17, you could be convicted of the crime of
6 child pornography if it is a nude image of someone between 17
7 and 18. Wouldn't I have to tell them that? Otherwise, how
8 would they know what child pornography is?

9 MR. LI: Your Honor, I don't think the jury needs to
10 understand the concept of child pornography or the legal
11 concept of child pornography because that legal concept is not
12 at issue.

13 THE COURT: How would they know it was child
14 pornography?

15 MR. LI: The jury only needs to know the fact that he
16 received an image from someone who he believed to be 17 years
17 old and that picture was nudish and that that is sufficient for
18 them to infer the intent that he sexually --

19 THE COURT: Would it be a fair inference if the child
20 was 18?

21 MR. LI: No, your Honor. We would not be arguing for
22 that inference if the child was 18.

23 THE COURT: That's the problem you have here, is that
24 there is a distinction as to age and there is a distinction in
25 the case of child pornography that the child could be between

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1 17 and 18 and it would be child pornography, but below 17 they
2 can't be guilty of the crime charged here under 2422(b).

3 MR. LI: That is right, your Honor. I agree that
4 there is a legal distinction that the Court has referenced
5 between child pornography and the federal case --

6 THE COURT: Oh, you and I get that. Everybody here
7 gets that. The question is what I tell the jury and I told you
8 what I proposed to tell the jury if I were going to let this in
9 and you said, oh no, Judge, don't do that.

10 MR. LI: Your Honor, maybe if I could go on to the
11 second reason why we think this is relevant and then we can
12 circle back to the limiting instruction that the Court would
13 potentially enter.

14 THE COURT: Does this relate to the 17 and
15 14-year-olds but not to the pop star?

16 MR. LI: Yes, your Honor.

17 THE COURT: Okay. So this, what you are about to tell
18 me has nothing to do with the pop star.

19 MR. LI: Correct, your Honor.

20 THE COURT: Okay. And your second reason is because
21 it reflects that this man had no intention of informing or his
22 intent to inform law enforcement of bad conduct.

23 MR. LI: Yes. That's exactly right, your Honor.

24 THE COURT: Okay. Well, we are going to put that one
25 aside because I have some questions for the defendant on that

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1 but at this stage of the game references to the pop star above
2 the age of 17 and to what you characterize as the quote or the
3 defendant characterized as the "nudish" pictures of the
4 17-year-old are out because, under 404(b) grounds, which is a
5 consideration on prior similar act testimony because of the
6 danger of unfair prejudice and jury confusion, quite frankly,
7 because I would have to explain how the distinction between a
8 person a day over 17 for the purposes of 2422(b) versus the
9 child pornography laws, and that would lead to juror confusion.

10 MR. LI: I understand the ruling of the Court, your
11 Honor.

12 Just so the Court is aware, some of the post-arrest
13 videos talk about the 17-year-old and the 14-year-old
14 essentially in the same sentence. We will work with the
15 defense to sort of parse this out as best we can but I just
16 wanted to let the Court know.

17 THE COURT: Either that or I can give a limiting
18 instruction that you can only consider -- it can't be parsed
19 out, then I would allow it in, but I would say you can't
20 consider the references to the 17-year-old as prior similar act
21 testimony but, to the best of your ability, filter it out.

22 MR. LI: We will do that, your Honor. Just to be
23 clear, the Court is also saying the references to the
24 13-year-old pop star should come in?

25 THE COURT: 13-year-old?

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1 MR. LI: Yes, your Honor; the pop star was a
2 13-year-old.

3 THE COURT: No. There is a 17-year-old pop star and a
4 13-year-old pop star. I'm only talking about the 17-year-old
5 pop star.

6 MR. LI: Your Honor, the 17-year-old is not a pop
7 star. The 17-year-old is an individual that the defendant
8 claimed he was communicating with.

9 THE COURT: Well, I'm talking about the man's name is
10 Justin Bieber.

11 MR. LI: Okay, your Honor.

12 THE COURT: Is that something you are planning on
13 offering?

14 MR. LI: No, it was not, your Honor.

15 THE COURT: Well, why is it in the motion papers
16 before me? I didn't see you disclaim that as what you were
17 seeking to offer in the 2011 conversation. I am looking at it,
18 it is on file at document 29-2, filed on January 24th, page 2
19 of 2.

20 MS. GALLICCHIO: Your Honor, maybe I can clear that
21 up?

22 THE COURT: Yes.

23 MS. GALLICCHIO: I actually submitted the entire chat
24 log to the Court so that the Court could read what the
25 government was seeking to introduce in context because I

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1 thought the context of that statement was relevant.

2 THE COURT: So, where do I find what the government
3 seeks to introduce?

4 MS. GALLICCHIO: It is in that section.

5 THE COURT: No, no, no, no. I am asking what -- I
6 understand what your point is --

7 MS. GALLICCHIO: Right.

8 THE COURT: -- that there is the universe and then
9 there is some subset of that that they're seeking to introduce.
10 Where do I find the subset?

11 MR. LI: Your Honor, it's in our motion *in limine*
12 paper in document no. 23 on page 3.

13 THE COURT: I apologize.

14 (pause)

15 THE COURT: And on the 2011 conversation all you are
16 offering is that portion?

17 MR. LI: Yes, your Honor.

18 THE COURT: Okay. So that makes it a lot easier.
19 That makes it a lot easier. Fine.

20 MR. LI: Okay.

21 THE COURT: So, we are good there. And I apologize, I
22 looked at the full transcripts as the best source of the
23 information. Okay.

24 MS. GALLICCHIO: Your Honor, just if I may?

25 THE COURT: Yes.

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1 MS. GALLICCHIO: With respect to that, if the Court is
2 ruling to allow that in we would be seeking for the entire
3 conversation to come in or a large portion of it, so that that
4 comment is placed in context. I don't know whether the
5 government has an objection to that and it may be something
6 that we can work on a compromise on but --

7 THE COURT: Well, what you have to tell me is taking
8 the July 29, 2011, are you seeking to offer each and every word
9 of it or something else less than each and every word?

10 MR. LI: Your Honor, based on our discussions with the
11 defense, we would propose to offer the entire chat because we
12 understand that the defense wants to use other portions of that
13 chat and so we would offer the entire chat message and then the
14 government is only going to be arguing from these five
15 sentences.

16 THE COURT: I think what you mean to be telling me is
17 something different than that which is you're offering what's
18 on page 3. You have no objection if the defendant wants to
19 offer the balance under the rule of completeness.

20 Is that what you are telling me? Or do you want to
21 offer the whole thing.

22 MR. LI: We are prepared to do it either way but just
23 to make it easier for everyone, we are prepared to offer the
24 entire thing.

25 THE COURT: If you do then I'm going to rule against

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1 you because I'm excluding certain portions that you can't get
2 into evidence. Whether the defendant can get it into evidence
3 is a different standard.

4 MR. LI: I understand, your Honor. Then we will offer
5 just these five sentences.

6 THE COURT: Right. But under the rule of completeness
7 if the defendant seeks to offer other portions of it at the
8 same time they will come in at the same time.

9 MR. LI: We have no objection to that, your Honor.

10 THE COURT: And that's what you want to do, right?

11 MS. GALLICCHIO: Yes, your Honor.

12 THE COURT: Okay. So that's fine, but let's just look
13 at the excerpts on page 3 of the government's *in limine* motion
14 A, B, and C. Is there a reason for me to exclude those
15 portions that you want to argue or do you want to just stand on
16 your arguments in your brief?

17 MS. GALLICCHIO: Your Honor, I stand on my arguments.
18 I think I fleshed them out.

19 THE COURT: All right.

20 MS. GALLICCHIO: I also ask that they be placed in
21 context as with the prior.

22 THE COURT: So you will get together with the
23 government and see what you can agree on under the rule of
24 completeness, but what I am permitting the government to do is
25 what appears under A, B, and C, on document 23, page 3.

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1 Now, since this has come up, what you are seeking with
2 regard to the so-called rape law tweet and the jail bait tweets
3 are what you have quoted in numbers 1 and 2 on page 2; is that
4 correct?

5 MR. LI: That is correct, your Honor.

6 THE COURT: Okay. And the defense stands on its
7 arguments in its brief?

8 MS. GALLICCHIO: Yes, your Honor.

9 THE COURT: I'm going to allow 1 and 2 in. I will say
10 a little bit more about that in some of my comments, and then
11 you have heard what I have said about what is item 4, the
12 direct child communications on page 3 going on to 4 of the
13 government's brief. And I will just say for the record that
14 Rule 404(b) provides that evidence of a crime, wrong, or other
15 act, is admissible for purposes of proving motive, opportunity,
16 intent, preparation, plan, knowledge, identity, absence of
17 mistake or lack of accident and it is subject to a four-factor
18 test, whether the evidence is offered for a proper purpose,
19 whether the evidence is relevant to the material issues in
20 dispute, whether its probative value is substantially
21 outweighed by prejudicial effect, and whether it's going to be
22 admitted with a limiting instruction if requested by the
23 defendant. The Second Circuit takes an inclusionary approach
24 to prior acts whereby evidence is admissible for any purpose
25 other than to show criminal propensity and the government is

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1 required to establish only a similarity or some connection to
2 establish that a prior act is relevant to one of the other
3 elements, in this case intent of the crime charged. In order
4 to be relevant, the evidence must be sufficiently similar to
5 the conduct at issue to permit the jury reasonably to draw from
6 that act the state of mind inference advocated by the proponent
7 and so that's where I believe that the evidence comes in. It's
8 true that the defense has the argument that Bright was not
9 speaking literally and that these posts and chats are either
10 too far in the past to be relevant or were either comments on
11 the arbitrariness of statutory rape laws or crude and tasteless
12 jokes and playful banter. And it seems to me that that's a
13 question of the weight, if any, to be given to the statements
14 by the jury and of course I am, if the defendants request,
15 going to give a limiting instruction that some of the tweets
16 are from 2019 and 2013 and that the Google chats are from 2010,
17 2012 is not a basis to exclude. The Circuit has affirmed the
18 admission of prior act testimony that was as much as 15 years
19 before the charged crime or charged conduct. That's the Larson
20 case and they pointed out that there is no bright-line rule on
21 age, that's the Mostafa case, and here I find that there is
22 sufficiently relevant and probative evidence and there is
23 nothing about the age which makes them less so.

24 Now, let me find out from the defense, because this is
25 kind of a guiding -- may be a guiding principle for me. What

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1 is the theory of the case with regard to whether these were
2 adult role play, or whether these were efforts to catch a
3 predator, or both? What is the theory of the defense?

4 MS. GALLICCHIO: So, your Honor, I am prepared to do
5 that. I just would ask the Court to ask that Agent Jensen step
6 out of the courtroom. She is the agent, the undercover agent,
7 and so I would ask that she --

8 THE COURT: I think that's fine. I think that's a
9 reasonable request and I'm going to grant it.

10 (Agent leaves the courtroom)

11 THE COURT: Go ahead.

12 MS. GALLICCHIO: Yes. Thank you, your Honor.

13 So, it is our theory, as we I think we have laid out
14 or touched on in our papers, your Honor, that Mr. Bright began
15 engaging with who turned out to be an undercover agent, under
16 the belief that he was engaging in a kinky chat room with an
17 adult who is engaging in a sexual practice known as role
18 playing or age playing where adults regress in age and take on
19 the persona and actions of a different age; a child perhaps, an
20 infant. It's a kink that people engage in. And, it is
21 something that he has engaged in on many occasions. The
22 government does concede that, that he is a practicing
23 age-player with consenting adults and that he was in a dating
24 site called Kinked -- it's name tells you a lot -- and it is a
25 place where people who engage in kinky sexual activities,

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1 fetishes and unconventional sexual practices, and that's where
2 he met her. She had a profile page in which she described her
3 role as mommy. "Mommy" is a term of art in that world, just as
4 "daddy" is. And so, when he engaged in the communication with
5 her he believed he was engaging with an adult who is offering
6 age-play with herself and her, what we would call, "littles" is
7 what the people in the age-play world call adult regressing to
8 a younger age. So, what he was expecting was a threesome,
9 basically, with consenting adults with the undercover agent
10 would be the mommy figure, dominant figure; and two other
11 adults would be playing the littles figures.

12 That is what he thought. Now, that changed. And his
13 communication with her throughout that was consistent with
14 that, is our position. That changed at some point during the
15 communication when the agent sent a photograph of, presumably,
16 of children, because I don't think there is a question about
17 that, and then his focus changed he became suspicious. I think
18 he had a lot of mental states at that point but he then decided
19 that he -- his intention changed -- that he was going to get
20 information about this woman so that he could turn it over to
21 law enforcement, concisely. But there was sort of clues became
22 greater and greater along the way once he got the photograph of
23 the children and that he never intended, ultimately, to engage
24 in enticing a minor to engage in sexual activities through the
25 mother.

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1 THE COURT: As you have heard me say, the interaction
2 with -- there was the communication with the agents about the
3 17 and 14-year-old, I gather sisters, and what I have indicated
4 is to the extent it can be redacted and still make sense, the
5 references to the 17-year-old are not relevant with regard to
6 the defendant's intent to entice a child under 17. However,
7 the conversation with regard to the 17 and the 14-year-old,
8 which turns to the question of did you think about reporting
9 this to law enforcement and why didn't you report this to law
10 enforcement, why doesn't that become relevant because of the
11 defense which is asserted in this case, specifically that the
12 defendant's intent changed to one to which I will call an
13 "intent to catch a predator" and this would be some evidence
14 bearing on this defendant's intent? Why wouldn't that come in
15 on that basis?

16 MS. GALLICCHIO: So, a couple things, your Honor.

17 I guess we are talking about two intents here, right?
18 The intent -- really, the intent that is relevant in this case
19 is did he intend to entice a 7 and 9-year-old to engage in
20 illegal activity? That is the intent that the statute requires
21 the government to prove, not that he intended to turn in
22 someone that he discovered was a child molester.

23 THE COURT: I totally agree, that's why I asked -- I
24 mean, for example, if you told me that's not your defense and
25 you are not going to argue it, it would change my whole

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1 thinking about this. So, it doesn't come in as a part of the
2 government's case except for the fact that whether it is a fair
3 response to the defense raised, in essence.

4 So, I don't think we are in disagreement on this.

5 MS. GALLICCHIO: Right. I guess then this raises
6 again the question of how does the jury get charged without
7 being -- I don't know about misled but probably confused moreso
8 as to the relevance, in other words --

9 THE COURT: Well, it is a limiting instruction.
10 Ladies and gentlemen, this is what the law sometimes refers to
11 as prior similar act evidence which can be considered on the
12 question of intent. You can only -- this is not charged
13 conduct in this case, you may not convict Mr. Bright on the
14 basis of any of this evidence. You can only consider it to the
15 extent that you conclude that it has some bearing on his intent
16 during the charged offense.

17 MS. GALLICCHIO: Right, but I guess there is two
18 intents here. Right? There is the intent which we are talking
19 about, there is the intent to entice a minor, right, and then
20 there is the intent to turn him in because he is going to be,
21 when he testifies or even in his statement to the police, he
22 says the same thing. When he engaged in this conversation
23 initially with this agent I intended to engage in age-play, I
24 wasn't trying to entice a minor to engage in sexual activity.

25 THE COURT: Well, but whether it is by opening

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1 statement or examination of witnesses the defendant suggests to
2 the jury, as I understand you desire to, that this was an
3 intent to catch these people and turn them in to law
4 enforcement. Now you, I assume, would tell me that the
5 government has to prove beyond a reasonable doubt that the
6 intent was to entice people, these young people into sex and an
7 intent to turn somebody into law enforcement is inconsistent
8 with that. Given that, my question is why isn't it a fair
9 response for the government to say we are going to show the
10 jury that that is not likely Mr. Bright's intent because of
11 what he said about an unwillingness to turn a person who is
12 engaged in prostitution to law enforcement and what appears to
13 be an unwillingness to report that a 14-year-old was being used
14 for sexual acts because of an opinion of his that this can
15 break up families. All right? I am not even getting into
16 judging whether that's a good idea or a bad idea but it's an
17 intent that is demonstrated by what he said on another
18 occasion. Why isn't that relevant?

19 MS. GALLICCHIO: No. I understand, your Honor, what
20 you are saying. I guess what I was saying is that I think the
21 problem is a limiting instruction would be with respect to that
22 intent so the jury would have to say it's not relevant to
23 whether he intended to entice a minor.

24 THE COURT: Right.

25 MS. GALLICCHIO: It is only relevant --

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1 THE COURT: Yes.

2 MS. GALLICCHIO: That's where the confusion is and how
3 do they separate, how does the jury separate, apply that.

4 THE COURT: Very easily. Very easily. Because the
5 trial is going to go on and it is: *Ladies and gentlemen, this*
6 *evidence is limited to the issue. You have heard the defense*
7 *say in their questioning of witnesses or in their opening*
8 *statements as it was said and this only goes to that issue and*
9 *not any other issue and you may only consider it on that issue.*
10 And then we move on.

11 Limiting instructions are a feature of trial practice,
12 they go on in every case and juries are very smart and judges
13 sometimes, if there is an uncertainty, the Judge repeats it or
14 reiterates it or searches for additional words with the aid of
15 counsel to drive home the point of the limiting instruction.

16 So, that's what I have to say there.

17 MS. GALLICCHIO: Your Honor, can I have one moment?

18 THE COURT: Yes.

19 (Counsel conferring)

20 MS. GALLICCHIO: So, I guess I just want to point out
21 what I think -- so, the question of relevance becomes a
22 question of is there similarity, meaning similarity or
23 connection to the prior offense.

24 THE COURT: Right.

25 MS. GALLICCHIO: So, the offense charged is his intent

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1 to report an adult who is committing crimes against another
2 person, right?

3 THE COURT: Right.

4 MS. GALLICCHIO: Against children.

5 THE COURT: No. Well, no. That's not actually
6 accurate.

7 MS. GALLICCHIO: The current offense, the offense
8 charged.

9 THE COURT: I see.

10 MS. GALLICCHIO: The offense charged.

11 THE COURT: I see. That is accurate. Okay.

12 MS. GALLICCHIO: That is accurate. And so the prior
13 act, the 404(b) evidence is different in that it's not a
14 scenario where he's -- it's a scenario he is refusing to or not
15 willing to report a crime but not a crime that's being
16 committed against other people, right? It's these girls
17 sending, unsolicited, their photographs. Unsolicited and not
18 downloaded by him. They send pictures. He can't prevent them
19 from sending pictures. They say -- one of them says -- the
20 17-year-old says I sometimes sell myself for money. Right?

21 THE COURT: Well, that's a crime.

22 MS. GALLICCHIO: That is a crime. Yes. Yes, of
23 course I agree with the Court.

24 THE COURT: All right.

25 MS. GALLICCHIO: But it's different that he is like,

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1 look, I'm not reporting that to the police. That intent is
2 different than the intent that we are talking about in the
3 instant offense. They are not similar or connected in a way
4 that makes it relevant to the intent in this case.

5 THE COURT: I hear your argument and you are certainly
6 free to argue that to the jury but I have a different viewpoint
7 on that and I want to clarify one thing that I said before and
8 amend it, and that is what I was referring about the limiting
9 instruction relates to the 17-year-old because I said at the
10 outset I think it gets too off-point to get into the question
11 of age of consent yet the age for child pornography and the
12 like. So, that is my thought with regard to the 17-year-old
13 and it being evidence that could be considered on intent as to
14 enticing, wholly apart from the defense you are raising. But
15 in the case of the 14-year-old girl, the limiting instruction
16 would be different. You can consider on both intent and also
17 on the defense that he was trying to catch a predator.

18 MS. GALLICCHIO: Can I speak briefly, your Honor, to
19 the relevance of the prior statements regarding the
20 14-year-old?

21 THE COURT: Yes.

22 MS. GALLICCHIO: So, with respect to those statements,
23 and looking through the clips, your Honor, it is certainly our
24 position that there isn't anything about those statements
25 regarding the 14-year-old that provide prior bad acts, that

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1 provide anything relevant or similar to the crimes charged and
2 that is because when you look at the clips, largely, I think
3 the first two clips are mostly about the 17-year-old. Clip 8
4 he actually denies interest in the 14-year-old. If we look
5 through them individually, clip 6 is the first one of the
6 direct communications with the 14 and 17-year-old and that is
7 largely -- and that actually starts on page 2, line 24, and
8 that clip largely relates to -- it does in fact only relate to
9 the 17-year-old, and then going to clip 7, your Honor, it is a
10 short clip that's not even a page long, that actually doesn't
11 even -- it mentions a 14-year-old but it has nothing to do with
12 the 14-year-old. Clip 8, your Honor, he actually, in that
13 clip, he denies having any sexual interest in a 14-year-old and
14 he distinguishes age regression and age-play with what the
15 agent is referring to.

16 THE COURT: You may have a point. Maybe I was right
17 the first time in a limiting instruction should be applied to
18 both the 17-year-old and 14-year-old.

19 I do want to hear the government on that one.

20 MS. GALLICCHIO: I just --

21 THE COURT: Yes.

22 MS. GALLICCHIO: I think if you look through -- and I
23 don't have to go through them all, I know the Court has read
24 them -- when you look through them there is really nothing but
25 for the fact he received photos from her that were nude or

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1 nudish and there is some dispute back and forth about what they
2 are and some debate with the agents about that. There is
3 really nothing sexual, nothing indicating that he had any
4 sexual interest in the 14-year-old and therefore I would
5 suggest first that it is not relevant.

6 THE COURT: Well, I think he describes the photos that
7 were sent by the 14-year-old, is my recollection, and he
8 received them.

9 MS. GALLICCHIO: And then deleted them.

10 THE COURT: And then deleted them. But, the jury
11 is -- I mean, he was asked was it sexual and his answer, you
12 see it on line 18 on page 13 of 23 and he is asked: *Is that*
13 *like the role playing is one thing?* And he says: *Yeah.*

14 MS. GALLICCHIO: Right. Right, it is different. I
15 guess my point is that he didn't do anything --

16 THE COURT: And he says it's just someone flirting
17 with you.

18 MS. GALLICCHIO: Right.

19 THE COURT: And so I think that bears on the intent
20 with regard to the charged crime because this is an instance
21 where the 14-year-old is a 14-year-old according to what I read
22 here and he is expressing an interest in having the 14-year-old
23 flirt with him. That's why a jury could read it that way.
24 They might read it another way but I certainly can read that.
25 That's what I think the fair reading is.

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1 MS. GALLICCHIO: I think what he is saying -- he found
2 it flirtatious, right? But, put in context, if you look at the
3 whole picture here, he says she's a stupid teenager, I'm not
4 interested in her, it has nothing do with my age-play, she
5 sends me a picture, I delete it, I didn't ask her for any
6 pictures. There is nothing about this that makes it more
7 probable that then, on May 22nd or whatever the date of this
8 case is, he intended to entice a minor to engage in sexual
9 activity.

10 THE COURT: Yeah, it does. Yeah, it really does. In
11 my mind I think a jury could find that, that this person -- so,
12 let's just read this here.

13 MS. GALLICCHIO: Which one, Judge?

14 THE COURT: I am on page 13 of 23, 36-1: This is the
15 defendant speaking: Like I say, the text with the messages
16 with the 17-year-old and the 14-year-old were flirty, I would
17 say. I didn't know what to make of her sex-for-money thing,
18 like.

19 SPIVACK: So the texts with the 14-year-old were also
20 flirty?

21 DEFENDANT: Yeah, you know, she was basically saying,
22 oh, like you know, English accents are so sexy and that kind of
23 thing.

24 SPIVACK: Did the 14-year-old ever send you a pic?

25 DEFENDANT: I think she sent me pictures but it's

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1 deleted as well.

2 SPIVACK: What did she send you?

3 ADAMCZYK: What was the picture?

4 DEFENDANT: I don't even remember. It was like her,
5 in, like, little -- it was her in, like --

6 SPIVACK: Was it sexual?

7 DEFENDANT: Panties and a t-shirt.

8 SPIVACK: Panties and a t-shirt?

9 DEFENDANT: Like, yeah.

10 ADAMCZYK: So here's the, like, role playing is one
11 thing?

12 DEFENDANT: Yeah, but like why talk to a 14 and
13 17-year-old, like why do you even -- why even entertain that.

14 SPIVACK: Especially if she's sending you panty pics.

15 DEFENDANT: Yeah, it's kind of flattering to be --
16 just have someone flirt with you.

17 I think that bears on intent. It will be a question
18 for the jury, not for me to decide, but a reasonable jury could
19 conclude that that indicates that this person is open to
20 engaging young minors.

21 MS. GALLICCHIO: So, assuming the Court is obviously
22 finding the relevance of it I would say then the next step we
23 look at is that relevance, is it outweighed by the unfair
24 prejudice that it would create in a jury's mind, right, based
25 on our position is obviously no relevance but the relevance

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1 that the Court has identified that he had a flirty conversation
2 with a 14-year-old who, unsolicited, sent him a photograph.
3 Right? That certainly is -- so it can be inflammatory, right?
4 And so, I would suggest that the probative value is outweighed
5 by what would be substantial prejudice.

6 THE COURT: All right. Now, one of the things we do
7 in this Second Circuit, and you are an experienced criminal
8 practitioner in this court house, is we look at whether this
9 evidence is more inflammatory than evidence just tending to
10 prove the indictment in this case and if, for example, you had
11 maybe some a kind of a drug transaction and you were trying to
12 offer prior similar act evidence that was going to get into a
13 murder or a torturing somebody, you would say the probative
14 value of that evidence is substantially outweighed by the
15 danger of unfair prejudice in the case. Here, this is not
16 anymore inflammatory than the charge and the evidence in the
17 case. So, I conclude that the danger of unfair prejudice does
18 not substantially outweigh its probative value.

19 MS. GALLICCHIO: Understood, your Honor.

20 I think with respect to that, those very clips and in
21 particular clip 10 I did have another objection.

22 THE COURT: Yes.

23 MS. GALLICCHIO: When you are ready.

24 THE COURT: Go ahead.

25 MS. GALLICCHIO: The other objection I had, your

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1 Honor, was with respect to, particularly I think it was clip 10
2 which is on page --

3 THE COURT: I have it here, 17 to 23.

4 MS. GALLICCHIO: Yes; that throughout this clip,
5 through a good portion of it it does appear that the agents
6 are, first of all, cutting Mr. Bright off consistently from
7 giving his answers, giving their opinions, expressing their
8 skepticism and their judgments over what he says.

9 THE COURT: I agree with you and I think I would like
10 the government to knock that out throughout the post-arrest
11 statements. We don't care what Spivack or anyone else thinks,
12 Adamczyk. There may be some, because this is a video
13 interview, where it is necessary to come in for context but you
14 and your client are entitled to a limiting instruction and you
15 should remind me, in the event I forget it, that the views of
16 Mr. Spivack and Mr. Adamczyk are utterly irrelevant and not to
17 be considered by you as evidence. Their opinions or commentary
18 on the conduct is not part of this case and may not be
19 considered by you as evidence of anything.

20 So, I agree with you. I have a similar reaction and
21 so the government has to cut it to the bone where they knock
22 off the commentary because there is opinions in there and
23 they're not relevant.

24 MS. GALLICCHIO: And that was with respect to -- I
25 raise it with respect to another portion which was clip 11

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1 which doesn't have to do with the 404(b) but.

2 THE COURT: Same point. Same point. I agree with
3 you.

4 Now, I have done a lot of talking, you have done a lot
5 of talking. Is there anything else anybody wants to say with
6 regard to the government's motion *in limine*? And then we will
7 talk about the defendant's evidence.

8 MR. LI: Your Honor, are you including within that
9 question the motion *in limine* as to the expert?

10 THE COURT: No. Not really. I wasn't really
11 considering that. I was considering that more of a defendant
12 point but technically I guess it is in your *in limine*. Exclude
13 that for the moment.

14 MR. LI: Then nothing else for the moment, your Honor.

15 THE COURT: Nothing else with regard to the statements
16 the government want to get in. Is there anything further from
17 anybody about the statements the government wants to get in?

18 MS. GALLICCHIO: No, your Honor. I think we have
19 covered it.

20 THE COURT: All right. I don't know if this is
21 helpful or hurtful but there are different ways to go about
22 judging. One is pretend that you haven't read the papers and
23 you haven't learned anything from the papers and just turn to
24 counsel and say, *What do you want to tell me?* and *What do you*
25 *want to tell me?* and we go back and forth and then I lay a

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1 ruling on you. And I think sometimes lawyers like that better
2 but it's not as productive as my giving you a reaction and
3 you're trying to talk me out of it, which is what you are paid
4 to do, what your ethical obligation is to do.

5 So, I have thought a lot about the testimony of
6 Dr. Cantor and I have read the January 28, 2020 letter several
7 times and Dr. Cantor says that he will testify about the
8 concept of age-play and he will also testify about the general
9 characteristics and behaviors of pedophiles and the opinion
10 that there is no relationship between engaging in age-play and
11 committing an illegal sex acts against a minor or desiring sex
12 with a minor. And the important point under *Daubert* and *Kumho*
13 *Tire* and the Second Circuit's decision in the criminal context
14 which is *United States v. Williams*, 506 F.3d 151, it is with
15 opinions based on science and technology, there has to be a
16 reliable methodology that the Court looks to whether or not the
17 testimony is grounded on sufficient facts or data, the
18 testimony is product of reliable principles and methods, and
19 that the witness has applied the principles and methods
20 reliably to the facts of the case. Other factors bearing on
21 reliability, whether a theory or technique has been or can be
22 tested, whether the theory or technique has been subjected to
23 peer review and publication, the techniques known or potential
24 rate of error and the existence and maintenance of standards
25 controlling the technique's operation and whether a particular

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1 technique or theory has gained general acceptance in the
2 relevant scientific community and those are not exclusive
3 factors.

4 It seems to me that testimony defining so-called
5 age-play is akin to what the prosecution often offers in cases
6 involving LCN or DTO -- LCN being La Cosa Nostra, DTO being
7 drug trafficking organizations -- where a witness takes the
8 stand and says, well, in my general experience this is what the
9 elements of a drug trafficking organization are, and this is
10 what a capo is, and this is what a soldier is, and this is what
11 an associate is, and this is what a consiglieri is, and this is
12 what an underboss is, and this is what a boss is.

13 So, I am inclined to allow Dr. Cantor to take the
14 stand and say there is something called age-based role play and
15 this is what age-based role play is. However, I do not believe
16 that there is a basis for Dr. Cantor to offer opinions about
17 the characteristics of pedophiles, the likelihood that a
18 pedophile would engage in age-based role play or whether or not
19 the willingness to gauge in such role play is predictive or not
20 of whether somebody will engage in bad conduct. And, listen, I
21 know and I believe that analogies are often times imperfect but
22 let's say someone is charged with committing a murder with a
23 .38 caliber weapon and a .38 caliber weapon is found in the
24 person's home. And putting aside issues of ballistics but the
25 argument is most people who own .38 caliber weapons do not

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1 murder people and, specifically, if you are the owner of a .38
2 caliber weapon and you go to a pistol range once a month, you
3 are a responsible gun owner and it makes it highly unlikely
4 that you would commit a murder. That sort of evidence is most
5 emphatically inadmissible.

6 The nature of criminal conduct is, it is aberrational
7 relative to society at large and the fact that most people,
8 many people, 95 percent of all people, if he could opine to
9 this and there is no basis disclosed in the notice that the
10 defendant has, but if he could say that I have done a study and
11 95 percent of the people who engage in age-based role play
12 where they pretend to be engaging with a 7-year-old or a
13 4-year-old in sexual banter but in fact they're engaging with
14 an adult, most of these people are 96 percent unlikely to
15 commit a crime, that testimony wouldn't be admissible, most
16 likely, because the question before this jury is whether this
17 person did engage in a crime. One could call a witness who
18 would say 99 percent of the population don't engage in this
19 crime. 99.9 percent of the U.S. population doesn't engage in
20 this sort of crime. That testimony is not relevant to whether
21 this defendant committed this crime but Dr. Cantor isn't even
22 close to that because he does not disclose, and the defendant
23 has not disclosed, a reliable methodology.

24 So, the only point that his testimony will be allowed,
25 unless somebody wants to try and talk me out of this and that's

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1 what I invited, is on the limited question of what is age-based
2 role play.

3 MS. BAHARANYI: I would like to attempt to, your
4 Honor, talk you out of that.

5 THE COURT: And I think the government is probably
6 going to try and talk me out of it too. There you go. Part of
7 it, at least.

8 MS. BAHARANYI: Your Honor, I think I would like to
9 turn to a case that I think is particularly helpful here,
10 *United States v. Joseph*, which we cited in our papers. It
11 addresses the issue of Dr. Cantor's qualifications and what he
12 can testify to. He is not held to the same standard as those
13 who are experts in hard sciences, for example. His expertise
14 is in human psychology, in human sexuality. It is a social
15 science and *United States v. Joseph* addresses the standard that
16 applies to experts who are admitted or seek to be admitted on
17 the basis of some sort of expertise in social sciences just
18 like Dr. Cantor. And there they said the question, whether --
19 excuse me. Social science research theories and opinions
20 cannot have the exactness, the exactness of hard science
21 methodologies.

22 So, when we are talking about his ability to give an
23 opinion and to educate on this area of age-play as well as
24 pedophilia, this Second Circuit case is saying don't look to
25 whether he has the same sort of -- the same methodologies that

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1 we would expect in the scientific context, the hard science
2 context. Look at the other parts of his qualifications that I
3 do think are laid out in his papers and his CV that was
4 provided to the government through the government's motion as
5 well. He has extensive experience both treating and
6 interviewing people who engage in age-play who have alternative
7 sexual interests, age-play being one of them. He has extensive
8 experience treating and engaging with individuals who have
9 pedophilia, which is a desire to have sex with children. I
10 think his exponential experience in this area that is not quite
11 like chemistry, not quite like biology, but is this social
12 science makes him more than qualified to give a jury not just a
13 definition of things like age-play as well as pedophilia but to
14 opine, as well, on the relationship between the two.

15 The other part I would like to address --

16 THE COURT: Well, now apply that to a social scientist
17 who has studied gun owners and murderers and he opines that a
18 gun owner who is careful enough to go to a pistol range on a
19 monthly basis to keep his skills up, who has gone to safety
20 training, is extremely unlikely to commit a murder.

21 Would you allow that if you were the Judge?

22 MS. BAHARANYI: Your Honor, if there is some
23 documented sort of research of the psychology of gun owners and
24 we know this person who is this expert in gun owners, treats
25 them, interviews them, engages with them over the past 20 years

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1 on a daily basis and has amassed this expertise that may not
2 be, you know, akin to what we see in another science but he has
3 amassed this expertise here from those interviews, that
4 experience, then I would say that might be possible.

5 THE COURT: Spoken like a good defense counsel.

6 MS. BAHARANYI: And that's what we have here. He has
7 a tremendous amount of experience, again laid out more
8 thoroughly in the papers. We are happy to provide additional
9 briefing on that as well, your Honor.

10 THE COURT: I am going on the basis of your disclosure
11 and you have not disclosed a reliable methodology at all. You
12 have disclosed a man's qualifications and experience but this
13 is not binary in the sense that does he have expertise? Yes.
14 You are welcome to opine in any area you would like or, no, you
15 can't opine on anything, or you can't testify at all. It
16 doesn't quite work like that. In my opinion there has to be --
17 I just went through a moment ago, from *United States v.*
18 *Williams*, the Circuit went through many of the factor present
19 in the Daubert analysis in the context of a criminal case.

20 Okay, but you have another point so let me not stop
21 you there.

22 MS. BAHARANYI: Your Honor, just briefly on that same
23 point before I move forward. I do think that the Second
24 Circuit has established a different approach to sort of 702 and
25 the admissibility of expert testimony and a more liberal

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1 approach than, perhaps, other circuits. This is not a case
2 that we provided to the Court but I would like to give the cite
3 in case it is helpful. This is in *Washington v. Kellwood*, it
4 is a district case out of this district, your Honor, the cite
5 is 105 F.Supp. 3d 293.

6 THE COURT: Just one second, please. Go ahead.

7 MS. BAHARANYI: 105 F.Supp. 3d 293, and I will point
8 you to a particular part of that case that I think is relevant.

9 THE COURT: Magistrate Judge Dolinger. Yes, I have
10 it.

11 MS. BAHARANYI: Judge Dolinger, at 305, I think the
12 Court gives a good summary or explanation of what the standard
13 in the Circuit is that, in the Second Circuit, and I will
14 quote, the Second Circuit liberally construes expert
15 qualification requirements in consideration of the thrust of
16 the federal rules and their general relaxation of traditional
17 bearers to opinion testimony.

18 I think that, along with what we see in *Joseph* with an
19 expert who is qualified to testify, qualified to testify based
20 off of a similar subject matter, sort of role playing in the
21 Internet chat room whose qualifications are based, in part, on
22 his interviews with individuals and his clinical experience. I
23 think we had something similar in this case that perhaps, under
24 a stringent 702 test, that expert in *Joseph* would not have been
25 able to or the Court would not have advised that he could

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1 testify. But we are in this world of social sciences, we are
2 in this world where the Second Circuit says we sort of want to
3 encourage this sort of testimony and we are in this world where
4 we are asking for Mr. Bright to be able to present a defense,
5 as is his constitutional right, and I think the combination of
6 all of those factors means we have to be a bit more liberal
7 with how we view the qualifications of Dr. Cantor. It doesn't
8 require much liberality because he is quite in fact very
9 thoroughly qualified and has tremendous experience, it is just
10 not the same that we see in certain other sciences. And the
11 Second Circuit has recognized that that's okay. Other
12 districts in the circuit -- other courts in the circuit have
13 recognized that that's okay.

14 But for the second point, your Honor --

15 THE COURT: Yes.

16 MS. BAHARANYI: -- if I can address that?

17 THE COURT: Sure.

18 MS. BAHARANYI: Brief court's indulgence?

19 THE COURT: Go ahead.

20 (Counsel conferring)

21 MS. BAHARANYI: I think the second point, your Honor,
22 goes to Dr. Cantor's ability to explain the typical practices,
23 the manners, the norms of individuals who actually engage in
24 sex with children or have a desire to engage in sex with
25 children. I know your Honor has mentioned that that might be

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1 beyond what you would allow Dr. Cantor to testify to --

2 THE COURT: No, I think I said that would be beyond
3 what I would allow him to testify to subject to hearing why I
4 shouldn't. Not a might but I would not allow it.

5 MS. BAHARANYI: That's why I would ask your Honor to
6 reconsider his 20 plus years of experience, research experience
7 as well, has been focused on the norms, the manners, the
8 behaviors of individuals who do in fact desire to have sex with
9 children. The government has alleged that our client,
10 Mr. Bright, is an individual who wanted to have sex with a
11 7-year-old and 9-year-old when he showed up at a meeting with
12 an undercover last May. That Dr. Cantor can provide an
13 explanation -- not an explanation, an education to the jury on
14 how those individuals typically behave, how they typically find
15 their victims, how they typically groom their victims. It is
16 relevant here because the jury will hear from not just our
17 evidence but from the government's evidence that what
18 Mr. Bright was doing last May was very different. I think that
19 this is the sort of --

20 THE COURT: Well, is the government offering an
21 expert?

22 MR. LI: We are not, your Honor.

23 THE COURT: Okay. Go ahead.

24 MS. BAHARANYI: Through the government's evidence
25 through the post-arrest statements they intend to introduce,

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1 the conduct from the messages from the undercover they intend
2 to introduce. The way in which Mr. Bright engaged,
3 communicated with the undercover, is not the way in which
4 someone who is actually desiring sex with children typically
5 engages or communicates. And so that's something -- the expert
6 can give that education without opining on the ultimate
7 issue -- we will ensure that he steers clear of that -- but can
8 give the sort of background information the jury needs to hear
9 to be able to say whether this conduct, whether what the
10 government is alleging is Mr. Bright's conduct is really
11 consistent with that of someone who wants to have sex with
12 children, who has that intent to have sex with children.

13 THE COURT: Thank you.

14 Let me hear from the government.

15 MR. LI: Your Honor, if I can just begin with the
16 *Joseph* case that the defense has pointed us to? I think the
17 difference between this case and the *Joseph* case is that the
18 Second Circuit was able to conduct at least a preliminary
19 Daubert analysis because it knew what the opinions were that
20 were being proffered and it knew what the bases were for those
21 opinions.

22 In the *Joseph* case the proposed expert was going to
23 testify about chat room practices which he had done studies on;
24 he a had done his Ph.D research on this area, proffered he had
25 done studies in this area, and the Court was able to say, well,

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1 based on that experience that you have in this specific area of
2 chat room fetish exploration you can testify about this.

3 This is something totally different. We do not know
4 from the notice what Dr. Cantor's opinions are about age play,
5 what is the defining characteristics of an age-player. What
6 are the defining characteristics of a pedophile. What is the
7 relationship, if any, between the two concepts. We just don't
8 know from the notice much less the bases for those opinions.

9 I will add on this point, your Honor, that since the
10 filing of the papers the government has tried to figure out
11 what Dr. Cantor might say by looking at the literature in the
12 CV that the defendant gave us and also looking at the
13 Dr. Cantor's website. We have not been able to find any
14 research, published research, that he has put out there on
15 age-play. As far as we can tell, the thrust of his research
16 seems to be on the biological characteristics of pedophiles.
17 So, he studies pedophiles; he puts them in MRI machines, he has
18 been able to do correlation analyses that correlate pedophilia
19 with brain matter, with left-handedness, with IQ, with height.
20 This is not the kind of characteristics of a pedophile, I
21 think, that the defense is going to be trying to offer and
22 certainly that kind of characteristic, that kind of biological
23 characteristic would not be relevant to this case.

24 So, I think for purposes of this Court's analysis
25 which is the Daubert analysis, there is really nothing to go

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1 off of. We don't know what the expert's opinions are and we
2 don't know what the bases are and it is the proponent of expert
3 testimony's burden to show the Court that expert evidence is
4 admissible and we don't believe the defense has met that burden
5 here.

6 THE COURT: Thank you. I adhere to my proposed
7 ruling.

8 There remains the question of voir dire. Let me say
9 that attorneys are welcome and will be welcome at this trial to
10 propose areas of further follow-up. Everyone has had the
11 opportunity to submit proposed voir dire to the Court and the
12 Court is taking that into account, in framing its questions of
13 jurors, but the proposal, which quite precisely is giving the
14 government and giving the defense a 30-minute blank check to
15 conduct voir dire, of course with the opportunity of either
16 side to jump up and say, *Your Honor, that's an outrageous*
17 *question to ask. You should strike it. It's irrelevant. Etc.*
18 *is, in a case like this, a recipe for disaster and the oddity*
19 *of this is that, what persuades me of this is something that*
20 *defense counsel wrote and wrote quite well and eloquently and*
21 *with which I agree: This case presents a number of sensitive*
22 *issues which require careful and precise juror questioning to*
23 *uncover biases and prejudices. Undoubtedly, many prospective*
24 *jurors will have strong feelings about the charge in this case.*
25 *Without careful questioning which is informed by a thorough and*

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1 *specific knowledge of the facts of the case, these biases may*
2 *well remain undetected.*

3 It is precisely for the reasons, therein, that I am
4 disinclined to have attorney-conducted voir dire on the basis
5 of you have 30 minutes, try not to ask any objectionable
6 questions and we will see how it goes. So, I'm not going to do
7 that. I will do my best to interview the jury. Jurors who
8 have affirmative responses will come to the side bar, we will
9 talk about it. I often will have the juror stand back and then
10 have some interaction with counsel to see if there is any
11 follow-up or what their positions are based on the responses
12 given. My experience is the jurors will speak and I will get
13 them to speak and the question is whether what they have said
14 indicates that they can be a fair and impartial juror and fair
15 to both sides or they can't, based on what they've said.

16 So, that's where I am on that.

17 I have indicated that we are going to start the trial
18 on Tuesday morning because of the funeral service for Judge
19 Batts and --

20 MS. GALLICCHIO: Your Honor?

21 THE COURT: Yes. Go ahead.

22 MS. GALLICCHIO: I'm sorry. I think one issue is
23 remaining and that was the defense 404(b).

24 THE COURT: Oh. You are so right. You are so right.

25 MS. GALLICCHIO: I hate to skip that, but.

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1 THE COURT: No. No. No. We should not skip that.
2 We should not skip that at all. I am getting ahead of myself
3 and you are quite right.

4 So, the defense has tendered a number of transcripts
5 or partial transcripts which they say indicate a desire or
6 intent to engage in age-based role play with an older person.
7 My review of the transcripts, at least as far as I could tell,
8 that was explicit in one of the transcripts but not in all of
9 them.

10 Let me hear the government's view on whether I should
11 allow that evidence in and, if not, why not.

12 MR. LI: Your Honor, our view is that this is not
13 probative of the defendant's intent in this case. The
14 government does not contest, there is no dispute that the
15 defendant has an interest in age-play. Frankly, from our
16 perspective, we don't care. The question is not whether he was
17 engaged in age-play on some other occasions or whether he is
18 interested in age-play in general. The question is simply
19 whether he intended, in this particular instance, to actually
20 entice minors for sexual activity or as the defense as I
21 understand it will argue, that in fact he was actually trying
22 to engage in sexual activities with adults pretending to be
23 children.

24 THE COURT: One moment, please.

25 (pause)

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1 THE COURT: Go ahead.

2 MR. LI: So in our view, the fact that he may have, on
3 five occasions or a hundred occasions previously engaged in
4 consenting age role-play with adults does not bear on the
5 question at all of whether he, on this particular occasion,
6 intended to entice a child for sexual activity. It seems
7 simply like all the other prior good act evidence that a
8 defendant could offer, in any criminal case, that on other
9 prior occasions that defendant did not engage in criminal
10 activity to prove that on this occasion they did not engage in
11 criminal activity, it is propensity evidence pure and simple.

12 THE COURT: Let me hear from the defense.

13 MS. GALLICCHIO: Yes, thank you.

14 We are not offering this as character evidence as we
15 have outlined in our papers, your Honor.

16 THE COURT: Well, because if it was character evidence
17 it would be inadmissible so are you not offering it for that.
18 I know that.

19 MS. GALLICCHIO: Right, but it's other acts which are
20 relevant to the issue of intent and motive just like the
21 government's 404(b). I know it is unusual for the defense to
22 seek to offer it but it is -- the rule does not preclude the
23 defense from offering prior acts on the issue of intent.

24 THE COURT: I agree with you. Just so the record is
25 clear, I do not see a limitation in Rule 404(b) and there is at

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1 least one case in which a defendant has done so or sought to do
2 so relating to 404(b) evidence relating to a co-conspirator.
3 So, on that point, I'm not seeing a limitation in the Rule that
4 would foreclose you from offering it.

5 MS. GALLICCHIO: Right.

6 So, with respect to -- we are not offering this
7 evidence I think that the government was objecting to. We are
8 not saying that on a prior occasion in which he had an
9 opportunity, he was in a situation where he could have
10 committed a crime against a minor and didn't. That's prior
11 good acts. Right? He was in a scenario -- with some of the
12 cases, the *Scarpa* case had that scenario; the *Benedetto* case as
13 well discusses where, on prior occasions, the defendant did not
14 engage in criminal activity under any circumstances in which he
15 could have. This is different. That's character, this is
16 different.

17 We are not saying only these five instances here but
18 we just selected a small sampling of his history of age-play
19 that it goes to just like prior bad acts go to intent, this
20 also addresses intent or motive in this case because it is our
21 theory of the case, your Honor, that he intended to engage in
22 age-play, that he intended to communicate with this undercover
23 officer to have a sexual encounter.

24 THE COURT: But this is where one of the parts where
25 your proffer starts to fall apart, in my view.

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1 So, this is not a criminal charge of directly
2 interacting with two young people. This was a situation where
3 the trial evidence will be that the defendant interacted with
4 an adult and at no time did the adult indicate that the adult
5 planned to impersonate any child. That was never, from what I
6 understand the evidence, that will not come out that the
7 special agent impersonating the mother claimed that she was
8 going to put on some role play impersonating a 7-year-old and a
9 4-year-old. That's very different than what we are dealing
10 with here.

11 MS. GALLICCHIO: Well, what she was proposing is that
12 she would have her companions; she would be the mother figure
13 of her companions who would play the role of her children.

14 THE COURT: Well, I tell you what. If that's the way
15 the testimony comes out then at the close of the government's
16 case you will point to that evidence and I will consider this
17 issue but you may not bring it out in opening or refer to these
18 transcripts in questioning of witnesses.

19 MS. GALLICCHIO: So, just some clarification, Judge.

20 I understand from the government that they have no
21 objection and I guess I need to know the Court's ruling, of
22 course, whether witnesses can testify. We can question
23 witnesses about the fact that one, they, for example, for the
24 agent, they searched his phone, they saw that he has a history
25 of engaging in age-play, or if Mr. Bright testifies he can

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1 testify to the fact that, *I engaged in age-play, I'm an age*
2 *player.*

3 THE COURT: I am absolutely going to allow that. I am
4 absolutely going to allow that. That is different in kind and
5 character than I think what you are proposing and it may be, if
6 that testimony comes in, it may influence a ruling on your
7 seeking to get these transcripts in but we are not up to that
8 at this stage of the game.

9 MS. GALLICCHIO: Okay. I think, just to be clear, I
10 wasn't -- I'm not suggesting that the agent -- the agent is not
11 going to say I was role-playing, of course. My client believed
12 in his mind, it was his state of mind that she was engaging --
13 she and her friends would be engaging in role-playing. She was
14 role-playing, her friends were age-playing, and so he believed
15 that's who he was communicating with.

16 THE COURT: He can definitely take -- nothing I am
17 saying implies in any way, shape, or form that I would preclude
18 him from so testifying. And then it may be that I will also
19 allow in these transcripts, but on the record as it stands now
20 this is, in my view, akin to what we have seen in some cases
21 where fraudulent intent is an issue and the claim is that with
22 knowledge of falsity, a person prepared multiple asylum
23 applications. And to rebut that evidence and contention of
24 intent, they offered evidence of the many occasions in which
25 they prepared asylum applications that were 100 percent

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1 truthful and accurate. And that evidence is not admissible.
2 It is, actually, I don't consider it character evidence but I
3 consider it propensity evidence; that it's more of a propensity
4 to do the right thing on other occasions. The fact that a
5 defendant has engaged in conduct that is not unlawful on other
6 occasions does not speak to whether or not the conduct he
7 engaged in on this occasion was lawful or not. And I see a big
8 difference between this evidence and the evidence the
9 government is offering because it really is through the lens of
10 evidence that is otherwise coming in. The evidence of the
11 conversations with the agent are coming in and this sheds light
12 on that and I don't see where the transcripts of your client
13 engaging in age-related role play does because there was no one
14 here who was, at least so far as the transcripts or least so
15 far as I understand the evidence, will come out that they were
16 proposing to impersonate children.

17 Now, if that evidence comes out, I may change my
18 inclination.

19 MS. GALLICCHIO: No. I don't expect that the agent
20 will say -- well, I don't know. The agent is not going to say
21 she intended to impersonate but it is what my client believed,
22 it is what his mental state was.

23 THE COURT: Well, he is allowed to take the stand and
24 testify to his mental state. I think that's perfectly his
25 right.

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1 MS. GALLICCHIO: Right. And he actually also, it is
2 clear in his statement to the police and his recorded
3 interrogation statement he does give that defense which will
4 come out in the government's case-in-chief. I intend largely,
5 my expectation is, or our hope would be, through his testimony
6 we would offer it.

7 So, I understand the Court's ruling that you are, at
8 this point, denying it, but I would like him to be able to --
9 and I see the government not objecting -- to be able to testify
10 that he has engaged in age-play before and give examples,
11 through testimony, without using the transcript and tell the
12 Court, unless and until the Court allows it.

13 THE COURT: Right. That, offhand, I believe you are
14 entitled to do that.

15 Any objection from the government?

16 MR. LI: No objection, your Honor.

17 THE COURT: Okay. So, I will see you -- I would like
18 you to get here at 9:30 on Tuesday morning. I don't know how
19 long we are going to wait for jurors, but if there are any last
20 minute issues we can take them up.

21 The schedule of the trial will be from 10:00 to 1:00,
22 an hour off for lunch, 2:00 to 5:00. If it gets to be 10
23 minutes to 5:00, call your next witness. If you don't have a
24 witness, reserve the right to conclude that you are resting
25 your case. And the reason I do this is because I am focused on

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1 the jury and the sacrifice that our jurors make in serving and
2 it is important that I work hard and the lawyers work hard in
3 using the jurors' time judiciously.

4 I will just say this week on Monday I had to wait for
5 civil jurors. I didn't get my jurors up into the courtroom
6 until 11:00 and we had a trial in which there were, I think,
7 five witnesses. We had openings, the five witnesses, closings,
8 and the Court's instructions, and it was in the hands of the
9 jury by 4:00 p.m. the second day.

10 So, criminal cases are a little different; the voir
11 dire takes longer but that's what I anticipate here.

12 How long is the government's direct case going to
13 take?

14 MR. LI: Your Honor, we anticipate calling four
15 witnesses; two will be very, very short witnesses. My guess is
16 we will finish -- setting aside cross-examination -- but the
17 government's case will probably be done within a day.

18 THE COURT: Okay. All right. I think I excluded time
19 through Monday. Anybody want to exclude time through Tuesday?

20 MR. LI: Your Honor, we will make the motion.

21 The government respectfully asks the Court to exclude
22 time until Tuesday in the interest of justice for the parties
23 to prepare for trial.

24 THE COURT: Any objection?

25 MS. GALLICCHIO: No, your Honor.

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1 THE COURT: Okay. I find that the ends of justice
2 will be served by granting a continuance until Tuesday,
3 February 11th, and the need for the continuance outweighs the
4 best interest of the public and the defendant in a speedy
5 trial.

6 The reasons for my finding are that the time is needed
7 to enable the Court to honor his good friend, the Honorable
8 Deborah Batts, who served this Court for 25 years and gave this
9 Judge a lot of joy in life.

10 So, that's the reason.

11 MS. GALLICCHIO: Absolutely, your Honor.

12 THE COURT: So, time is included until Tuesday
13 morning.

14 Anything else?

15 MR. LI: Nothing from the government, your Honor.

16 MS. GALLICCHIO: I'm sorry, Judge, just with regard to
17 scheduling. Can I just get a -- we are flying in Dr. Cantor
18 from Canada so I expect that -- I know.

19 THE COURT: You will have to talk to the government on
20 that. You will have to see how Tuesday goes. You can also
21 talk to the government about the possibility of his testifying
22 out of order if there is a jam. Such things have happened
23 before and usually counsel on either side are reasonable about
24 such things.

25 MS. GALLICCHIO: Very well.

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1 THE COURT: All right. Have a very, very pleasant
2 weekend and see you on Tuesday morning.

3 MS. GALLICCHIO: You as well.

4 MR. LI: Thank you, your Honor.

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